

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 709 OF 1988

State of Maharashtra.

.... Appellant.

Versus.

Gajanan Baburao Phakatkar,
Age: 30 years, Occ.: Service,
resident of Kanta Kadam Mistri
Chawl, Sandvik Colony, Bhosari,
Pune.

.... Respondent.
(Org.Accused.)

Shri F.R.Shaikh for the Appellant.

Shri S.G.Surana for the Respondent.

**CORAM ; SMT.RANJANA DESAI, &
ABHAY S. OKA, JJ.**

DATED : 7th Sept., 2004.

ORAL JUDGMENT (Per Abhay S.Oka, J.)

1. By this appeal against acquittal the Appellant-State of Maharashtra has taken exception to the Judgment and Order dated 10th May 1988 passed by the learned Additional Sessions Judge, Pune, by which the Respondent has been acquitted of the offences punishable under section 302 and 498A of the Indian Penal Code, 1860.

2. The Respondent/accused was the husband of late Mrs.Ujwala Gajanan Phakatkar. The Respondent married to the deceased Ujwala sometime in the year 1980 and they

had two sons aged about 7 years and 5 years. The Respondent and his deceased wife were staying at Bhosari, Pune. The case of the prosecution is that the Respondent was addicted to vices and was subjecting his wife to ill-treatment. It is the case of the prosecution that on or about 22nd January 1982 there was a quarrel between the Respondent and the deceased Ujwala and the Respondent tried to set deceased Ujwala on fire by pouring kerosene on her person. At that time the deceased received some burn injuries and she narrated the said incident to her father. The case of the prosecution is that her father did not file any Police complaint with the hope that the relations between the Respondent and his wife will improve.

3. The prosecution has alleged that on 7th May 1987 at about 7.00 a.m. the Respondent poured kerosene on the person of his wife Ujwala and set her on fire. The case is that the deceased was serving in the office of the Municipal Corporation of Pune. She returned to her house at about 5.00 p.m. and started cooking on gas stove. The two minor sons were playing outside. After the deceased returned to the house, the sons also returned to the house. 7th May 1997 was Thursday which was a holiday for the Respondent. The case of the prosecution is that the Respondent came from behind and

poured kerosene on the deceased Ujwala and lighted a match stick and set her on fire. According to the prosecution elder son Chetan witnessed the incident as he was on the cot in the room. The deceased ran out of the room and one Fakir Mohammed who is running a cycle shop near the premises of the Respondent along with the other neighbours extinguished the fire with sand and water. The prosecution case is that the Respondent did not make any attempt to extinguish the fire though he was present. The victim was taken to the Sasoon Hospital at Pune where she was admitted in burns ward. According to the prosecution on 8th May 1987 at about 1.40 a.m. the first dying declaration was made by the deceased Ujwala before the Special Judicial Magistrate in which she purportedly stated that she was wearing a silk saree which caught fire accidentally while she was cooking and therefore, she suffered burn injuries. She stated that it was her husband who extinguished the fire and that her sons were present in the room when the incident occurred. The parents of the deceased were informed of the incident who rushed to the Hospital and remained in the hospital till the death of Ujwala on 12th May 1987. The case of the prosecution is that the deceased Ujwala told her mother Vijaya that it was her husband who had set her on fire and as she was hopeful of survival, in the interests of the children, she had

given a false statement to the Special Judicial Magistrate. On 12th May 1987 at 9.00 a.m. Dr.Chaudhari recorded statement of Ujwala in which she stated that she had a quarrel with her husband and the husband poured kerosene on her. When she tried to light the stove to cook rice her kerosene soaked saree caught fire. The fire was not extinguished by the Respondent who was nearby. Ujwala expired at 12.45 p.m. on the same day before the Police could be called for recording dying declaration.

4. The prosecution examined as many as 9 witnesses out of which P.W.3 Chetan is the minor son of the deceased. After considering the evidence, the learned Sessions Judge came to the conclusion that the prosecution case was not proved beyond reasonable doubt. He also held that the prosecution failed to prove the motive of the accused in committing the crime. The trial Court did not accept the evidence of the minor son of the deceased.

5. Shri Shaikh, the learned A.P.P. appearing for the Appellant-State submitted that the evidence of the child witness Chetan (P.W.3) ought to have been accepted as there was no reason for the son to depose against his father. He submitted that the evidence of the child

witness shows that he was in position to understand the implications of the questions put to him and therefore, there was no reason to discard his evidence only because the age of the witness was 7 years. He submitted that the contradictions, if any, in the evidence of P.W.3 were of a very minor nature and were not sufficient to discard his version. He submitted that even the deposition of the mother of the deceased (P.W.8) inspires confidence and she has stated on oath in what circumstances the deceased gave statement to the Special Executive Magistrate earlier and the manner in which the deceased poured kerosene on her person. The learned A.P.P. also relied on the evidence of P.W.2 father of the deceased. He submitted that if the entire evidence on record is read as a whole no other conclusion save and except the conclusion regarding the guilt of the accused can be drawn. He submitted that the theory propounded by the accused of accidental fire cannot be accepted considering the medical evidence and other evidence on record. He, therefore, submitted that the guilt of the Respondent/accused was proved beyond reasonable doubt and therefore, appeal should be allowed.

6. The learned Counsel for the Respondents submitted that the evidence of the child witness cannot be the

sole basis for conviction. He submitted that there is every possibility that the child witness is tutored and in the facts of the case the child witness was in the company of his grand father i.e. father of the deceased from the date of the incident. He submitted that without ascertaining whether the minor witness knows the implication of administering oath, the learned Judge administered oath to the witness. He pointed out that the learned Judge has not recorded any finding that the child witness was in position to properly understand the questions and was in a position to give answers to the question. He submitted that even if the evidence of the child witness is read as it is, the same cannot be accepted as there are material contradictions in the said evidence. He submitted that considering the evidence of the witnesses, this not a case where the guilt of the Respondent has been established beyond reasonable doubt. He, therefore, submitted that no interference was called for in the present appeal against acquittal.

7. In the light of the submissions made by the learned Counsel appearing for the parties it will be necessary to consider the oral evidence on record.

8. P.W.1 Pramod Kumar is the photographer who has taken

photographs of the scene of offence. Nothing really turns on his evidence. P.W.2 is Pandurang who is father of the deceased. He has deposed that after her marriage the deceased Ujawala used to come to his place and he also used to go to her place. He stated that the behaviour of her husband i.e. accused no.1 was not proper and he was addicted to some intoxicants.

9. He stated that on 7th May 1987 at about 11.00 p.m. he was informed that his daughter Ujwala has suffered burn injuries and she has been taken to Sasoon Hospital. He went to the hospital along with his wife and two sons when he found that Ujwala's sister-in-law, and her husband's brother were around her. He stated that the family members stayed in the Hospital. On 9th May 1987 at about 5.15 p.m. his wife informed him that Ujwala stated that her husband had set her on fire. He stated that at about 6 to 6.30 p.m. on the same day, Ujwala narrated to him that her husband had set her ablaze. He stated that Ujwala's husband did not turn up in the hospital till the time of her death. He stated on 11th May 1987 he went back to his house for taking bath. At that time Chetan the elder son of the deceased told him that the accused had set the deceased on fire. He stated that the accused did not turn up even to perform last rites of the deceased Ujwala and his brother

performed her last rites. He stated that he lodged complaint on 13th May 1987 about the incident.

10. In cross-examination he admitted that both sons of deceased were staying in his house from 8th May 1987. He admitted that the accused had been to the hospital along with Ujwala at the time of admission and there were burn injuries on his left hand and chest. In the cross-examination he stated that his daughter was drawing salary of Rs.800 to Rs.900 per month and his daughter had purchased a piece of land admeasuring about one-half Guntha, a television and a cupboard from her own earnings. He stated that the daughter had also purchased a gas connection. He admitted that the deceased Ujwala and accused used to come to his place till 7th May 1987. He admitted that he had not talked to his wife or sons about the incident either on 11th or 12th May 1987. There is no explanation as to why he waited for filing the complaint till 13th May 1987 when according to him on 11th May 1987 itself daughter Ujwala had told him and his wife that accused had poured kerosene on her body and set her ablaze.

11. P.W.3 is Chetan whose age is stated to be 7 years at the time of recording of evidence. We find from both Marathi and English depositions of the witness that oath

was administered to him. Perusal of the record shows that the learned Judge has not ascertained whether the child understood the duty of speaking truth or he understood the nature of oath or affirmation. More over he has not recorded his satisfaction about the fact that the witness was in a position to understand the question and to give reply to the said question. In his deposition Chetan stated that on the date of incident his mother had brought a bat for him. In the evening his father assaulted his mother by the said bat and thereafter set her ablaze after pouring kerosene on her person. He stated that thereafter the mother came out running and other people extinguished the fire. He stated in the cross-examination that he was playing outside the house and he came inside the house at 6 p.m. along with his brother Yogesh. He stated that accused came thereafter and he slept on the bed. He further stated that he and his brother also retired to the bed alongwith the father. He stated that he got awakened when he heard shouts of his mother. He stated that when he heard shouts of his mother, door of the room in which mother was there was closed. He stated that till the time the police made enquiries with him, he did not tell any one about the incident. He stated that when the police recorded his statement, his grand father was sitting by his side and his grand father did not tell

him to give statement before the police.

12. As we have stated earlier, the learned Judge appears to have administered an oath to the said witness. Section 4 of the Oath Act 1969 provides that oath or affirmation shall be made by all witnesses who are required to give evidence before the Court. Proviso to section 4 says that where the witness is a child under 12 years of age, and the Court or person having authority to examine such witness is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions of section 4 will not apply to such witness. Therefore, when the Judge is of the opinion that the witness does not understand the nature of oath or affirmation, the oath or affirmation need not be administered to the witness. The Apex Court has dealt with the provisions of section 118 of the Indian Evidence Act 1872 and sections 5 and 13 of the Oaths Act 1897 in a Judgment reported in AIR 1952 S.C. page 54 (Rameshwar s/o.Kalyan Singh v/s. The State of Rajasthan). Justice Vivian Bose who spoke for the Bench, referred to the proviso to section 5 of the Indian Oaths Act 1873 which reads thus:

. "Provided that where the witness is a

child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of S.6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The Apex Court considered the question whether opinion referred to in the proviso must be formally recorded or whether it can be inferred from the circumstances in which the deposition was recorded. After considering the proviso to section 5 of the Indian Oaths Act, 1873 and section 118 of the said Act of 1872, in paragraph 11

the Apex Court held as under:

"I would add however that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they

think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."

13. Relying upon the said Judgment of the Apex Court, a Division Bench of this Court in the Judgment reported in 79 Bom.L.R. page 132 (State v/s.Sharanappa) held that :

At the outset, we are constrained to make one observation regarding the mode of recording evidence of such a child witness. No doubt, following the head note given by the Supreme Court in the case of Rameshwar Kalyan Singh v. State of Rajasthan, nowadays we find the Judges take the precaution of putting preliminary questions to ascertain whether the witness is in a position to distinguish between truth and falsehood. But they conveniently ignore the other caution repeatedly given that while recording the evidence of such a child witness it should

invariably be in the form of questions and answers. This mode of recording the evidence is not only a fairplay but gives an idea to the Court which takes down the deposition as well as to the appellate Court what exactly the question put was and what answer was given by the witness. from the frame of questions and the answers given one can make out how far the witness is tutored, if at all, and in what manner. The evidence taken is in the usual stereo-typed manner in the form of a long narration. It is difficult to make out in what way the question was put by the public prosecutor himself, whether she was led in any manner and whether it was proper under the circumstances. Another feature worthy of note is that when the evidence is taken in question and answer form, the Judge himself is able to form his opinion from the demeanour as well as the details given, whether she is a truthful witness. Ample opportunity is also provided to the appellate Court to make out in what manner these particulars have come on record. Therefore, it is not only advisable but quite essential to record the evidence of the child witness in the question and answer form after

making a note as stated in Rameshwar Kalyan Singh's case. That caution is given by the Supreme court with a view to ascertain whether the witness is really capable of distinguishing between truth and falsehood, whether she is in a position to understand the implications thereof. From that point of view it would be better if the questions actually put are also recorded in the note because they are a test of her credibility and the degree of her understanding.

14. In a recent Judgment of the Apex court reported in (2004) 1 S.C.C. page 64 (Ratansinh Dalsukhbhai Nayak v/s. State of Gujarat) the Apex Court had occasion to consider the law relating to a child witness. In paragraph 7 the Apex Court held as under:

"7. In Dattu Ramrao Sakhare v. State of Maharashtra it was held as follows :(SCC p.343, para 5)

. "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. KIn other words even in the

absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manner, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however be disturbed by the higher court if from what

is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and other live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm but if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

If we apply the test laid down by the Apex Court in the Judgment it is apparent from the record of the case before us that there is nothing to indicate that the learned Sessions Judge noticed manners of the child witness, his apparent possession or lack of intelligence. The learned Judge has not resorted to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. There appears to be no decision of the learned Judge on this aspect.

15. In so far as the child witness is concerned, the

Privy Council in the judgment reported in AIR 1946 Privy Council page 3 (Mohamed Sugul Esa Mamasan Rer Alalah v/s. The King), held that the evidence of a child witness is admissible in evidence whether corroborated or not. However, the Privy Council held that it is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn. The Privy Council further held that this is a rule of prudence and not of law. The Division Bench of our Court in the case of State v/s. Sharanappa (supra) held that :

. "Another rule of caution which has been time and again given by the various High Courts is that although the child witness is competent to testify, it is notoriously dangerous unless her statement is recorded immediately and before she comes in contact with others and in particular her close relatives."

The Apex Court in the Judgment reported in (1998) 7 S.C.C. page 17 (Panchhi and others v. State of U.P.) had occasion to consider the evidentiary value of the evidence of a child witness. In paragraphs 11 and 12 the Apex Court held as under:

"11. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P., Baby Kandayanathil v. State of Kerala, Raja Ram Yadav v. State of Bihar, and Dattu Ramrao Sakhare v. State of Maharashtra."

In the light of the position of law which emerges from the aforesaid decisions, the evidence of the minor witness Chetan will have to be appreciated. In the evidence of P.W.2 Pandurang he has stated that both the minor sons of his daughter were brought to his house on 8th May 1987. From that day till the date on which statement of Chetan was recorded i.e. on 14th May 1987 he was residing in the house of the father of the deceased. Moreover father of the deceased accompanied the child witness when his statement was recorded by the

Police. A child witness can be easily tutored and therefore, delay in recording of statement of such child witness is very material. The English deposition of the child witness and the Marathi version thereof do not show that any preliminary questions were asked by the learned Sessions Judge to the child witness for ascertaining whether the witness understands the implication of administering oath. No questions are asked even to ascertain whether the witness was in a position to understand the questions and answer the same. Without taking the said precautions, oath was administered to the child witness. As stated by the Supreme Court in the case of Rameshwar (supra) satisfaction of the Judge that the child understands the duty of speaking truth is very important and such satisfaction can be gathered from the circumstances when there is no formal certificate recorded by the learned Judge. In the facts of the case before us, there is nothing on record to indicate that the learned Judge satisfied himself about the capacity of the child witness to understand the nature of the questions. There is nothing on record to show that the learned Sessions Judge before proceeding to record the evidence formed an opinion that the child was in a position to understand the duty of speaking truth. We are of the opinion that it is desirable that the learned

Magistrates and the learned Session Judges should normally follow the procedure which is laid down in the judgment of the Division Bench of this Court in the case of State v/s. Sharanappa.

16. The credibility of the child witness appears to be doubtful. His statement has been recorded belatedly. In his deposition, he has stated that he does not like his father. So far as the incident is concerned, he admitted in cross-examination that he was sleeping on the bed and he was awakened by the shouts of his mother and when he heard the shouts, door of the room in which his mother was there was closed. Evidence of the child witness has been recorded after about a year after the incident. Considering all these aspects, it is very unsafe to rely upon the evidence of the child witness.

17. The next witness is P.W.4 Dr.Laxmikant Badhe. He is a medical practitioner who performed the postmortem examination of the victim. He narrated the nature of the burn injuries on the person of the deceased. He stated that the burn injuries were antimortem. He gave cause of death as shock due to result of burn injuries. Nothing much turns on the evidence of the said witness.

18. P.W.5 is Fakir Mohammed Ibrahim who stated that he was running a cycle repairing shop near the house of the accused. He deposed that on 7th May 1987 at about 7.45 p.m. he saw the deceased coming outside the room in burnt condition. He stated that her husband was sitting on the otla. He stated that after coming outside the room, she collapsed. He stated that he helped the other persons in extinguishing fire by putting sand. He stated that both the hands of the accused were burnt. He also saw from outside that kerosene was spread on the floor of the room. He stated that he locked the room and gave key to the neighbouring lady. His statement was recorded by the Police on 13th May 1987. There is hardly anything significant in the cross-examination of the said witness.

19. Dr.Ravindra Chaudhari, P.W.6, was at the relevant time resident Doctor in the burns ward of the Sasoon Hospital, Pune. He stated that the victim wanted to give statement and therefore, he went to the victim and asked all the relatives present to leave the room. He verified that the patient was in a position to speak and give statement. He stated that the patient gave her statement in Marathi which he recorded in English in the case papers. The witness stated that the victim told him that there was quarrel between her and her husband

and after that her husband poured kerosene on her. She stated that when she tried to light up the stove to cook rice when her kerosene soaked saree caught fire. Her husband was nearby who received burns. The fire was extinguished by the neighbours and not by husband. He stated that he informed the R.M.O. that the patient wanted to change her dying declaration and therefore, Police should be informed. The Police were informed by at about 11.15. Thereafter the patient was in poor condition and she expired at 12.45 p.m.

20. We have also perused the case papers which are produced by the said witness at Exh.26. The case papers record that the burns were to the extent of 90%. The case papers record that on 7th May 1987 at 10.10 p.m. the patient was conscious to give statement. At that time she stated that there was sudden flaring up of flame of the stove at 7.00 p.m. while she was cooking. There is an endorsement made on 12th May 1987 when her second dying declaration came to be recorded. P.W.6 has stated that the victim told him that as a result of quarrel the husband poured kerosene on her body. However, the lady did not state that it was her husband who set her on fire. She stated that when she lighted the stove her kerosene soaked saree caught fire. However, while recording the statement on case paper,

P.W.6 has recorded that the victim stated that there was sudden flaring up of flame of stove while she was cooking and thereby she got accidentally burned. Therefore, the version of P.W.6 does not fully support the prosecution. Even if we accept the dying declaration recorded by P.W.6 it is very clear that the victim did not tell that she was set on fire by her husband.

21. P.W.7 is Balbhim Ransingh who is P.S.I. attached to Bhosari Police Station. He recorded the spot panchanama. He stated that one pump stove was kept on the kitchen platform but the pump of the stove was not found on the stove and he could not find it out even after search. He stated that the gas stove with the gas cylinder were also there on the kitchen platform. He also attached the stove without pump, a plastic can containing some quantity of kerosene, a damaged match stick box, one curtain stained with burned cloth pieces. It is to be noted here that the bat which was allegedly brought by the victim for P.W.3 Chetan which was allegedly used by the accused to assault the victim was not found at the spot of incident.

22. The next important witness is Mrs.Vijaya, P.W.8, i.e. the mother of the victim. She deposed that on 7th

May 1987 itself she along with family members came to Sasoon Hospital. On the third day thereafter her daughter told her that her husband poured kerosene on her person and had set her on fire. She admitted that she did not file any complaint and the complaint was filed on 13th May 1987 by her husband. Her evidence is not consistent with the statement of the victim recorded on case paper. Her conduct of not making any complaint is also unnatural. P.W.9 is Padmakar, P.S.I. attached to Bhosari Police Station who was examined to prove the arrest panchanama and report of the Chemical Analyser. In the cross-examination he stated that the deceased was having a sum of Rs.10,000/- in her bank account.

23. At the time of admission of the victim to the Sasoon Hospital, it appears from the case papers that she was conscious to give history of accidental burns and the reason for fire given by her was the sudden flaring up of flame of the stove. Even P.W.6 who allegedly recorded her dying declaration stated that according to the victim the accused poured kerosene on her person and after she tried to light the stove, kerosene soaked saree caught fire. As stated earlier, the evidence of P.W.3 who is the only eye witness will have to be disbelieved for the reasons which are already recorded.

24. The complaint was filed by the father of the victim belatedly on 13th May 1987. Even according to the mother of the victim, on 11th May 1987 the victim told her about the incident of pouring kerosene on her person by the accused and the act of the accused setting her on fire. The victim was a Municipal employee and she was not dependent on her husband in that sense. It has come on record that the deceased was having some bank balance. The father of the victim admitted that the deceased Ujwala had purchased a small portion of land at Bhosari. Thus the victim was not an ordinary housewife. If her husband was really guilty, the victim was in a position to say so in both the Dying Declarations. Taking an overall view of the evidence on record, it cannot be said that the guilt of the accused has been established beyond reasonable doubt. We have also perused the impugned Judgment and order. We find that the learned Judge has appreciated the entire evidence on record and has recorded the findings which are proper which need no interference. The appeal is therefore dismissed. The bail bond of the accused stands cancelled.

(Smt.Ranjana Desai, J.)

(Abhay S.Oka, J.)